NATIONAL AIDS CONTROL COUNCIL

PUBLIC COMMENTS FORM ON THE REVIEW OF THE HIV AND AIDS PREVENTION AND CONTROL ACT, 2006

Dear Sir/Madam

Thank you for your interest in participating in the review of the HIV and AIDS Prevention and Control Act, 2006. To enable successful review, please submit your written comments on the Act to:

Through Post of Hand Delivery:

The Chief Executive Officer,
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OR

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The Kenya Legal & Ethical Issues Network on HIV and AIDS (KELIN) was established in 1994 and registered as a Non-Governmental Organisation (NGO) in 2001. While initially conceived to protect and promote HIV-related human rights, its scope has expanded to also include: sexual and reproductive health and rights, key populations, health and governance, and women, land and property rights. KELIN advocates for a holistic and rights-based approach of service delivery in health and for the full enjoyment of the right to health by all, including the vulnerable, marginalized and excluded populations across the five thematic areas.

This is a joint submission made by KELIN together with the Key Population Consortium comprising of organizations and community representatives working with and around issues of KP HIV programming and Esther Nelima a community health advocate based in Mombasa County. We are advocating for the domestication of the provisions of the progressive EAC HIV and AIDS Prevention and Management Act of 2012 (EAC Act) and its implementation in the EAC states. Initially, when the HIV and AIDS Prevention and Control Act, 2006 was enacted there was a focus on the prevention of HIV transmission however today, certain provisions of the law, such as Section 24 which was declared unconstitutional serve no purpose and instead undermine HIV prevention efforts by discouraging people from testing and disclosing their HIV status. Kenya has ratified the said law and such, should implement the same for purposes of harmonization. We believe that a harmonized, rights-based regional law such as the EAC Act, will help to provide a uniform framework within which synergistic HIV programming can take place across countries in the region and help to strengthen national, cross-border and regional responses to HIV. Once aligned to the EAC Act and the Constitution of Kenya,2010, the HAPCA will act as a guide to rights based responses to HIV.

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Section of Act	Proposed Changes	Reasons for Proposed Changes
PART I- PRELIMINARY		
Section 2 – Interpretation	• Include definition of informed consent as consent given without any force, fraud or threat and with full knowledge, information and understanding of the medical and social consequences of the matter to which the consent relates • Include definition of "partner notification" as a voluntary process whereby a trained healthcare provider asks a person diagnosed with HIV about their sexual partners and/or drug-injecting partners, and then, with the informed consent of the client agrees, offers these partner(s) HTS • Maintain current definition of a "Healthcare provider" which includes the recognition of HTS and other community-level service providers who are certified by the Ministry of Health.	N/A

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	• Include definition of "HIV self-testing (HIVST)" as a voluntary process in which a person using a prescribed test, collects his or her own specimen (oral fluid or blood) and then performs an HIV test and interprets the result, in a private setting with or without the involvement of a healthcare provider • Include definition of "Harm Reduction Interventions" to mean evidence-based interventions that aim primarily to reduce the adverse health, social and economic consequences of the use of legal and illegal psychoactive drugs in people unable or unwilling to stop including elements of safer use, managed use and medication supported treatment plans • Include definition of "post-exposure prophylaxis (PEP)" as antiretroviral medicines taken by a person after a high risk exposure in order to attempt to prevent acquisition of HIV • Include definition of "Pre-Exposure Prophylaxis (PrEP)" as antiretroviral medicines taken by a person before exposure in order to attempt to prevent acquisition of HIV	

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	• Include the definition of "Priority Populations" are groups who are at increased risk of acquiring and transmitting of HIV, irrespective of the epidemic type or local context.	
PART II- HIV AND AIDS EDUCATION AND INFORMATION		
Section 4- HIV and AIDS education and information	Section 4 of HAPCA rightfully addresses the role of the government in the dissemination of comprehensive information on HIV and AIDS to the public and should remain in the current Act. However, the educational and information campaigns referred to in the Act need to be revised to mirror those laid down in Section 6 of the EAC HIV Act. Section 4(2) should read as follows: (2) The education and information campaigns referred to in subsection (1) shall- *(a) Employ scientifically proven and evidence-based approaches;* *(b) Encourage the voluntary testing of individuals;*	The current section is incomplete, in that, it does not provide the 'how to' when it comes to the implementation of educational campaigns. This is sufficiently addressed in the EAC Act where the government is required to, in summary, ensure the information is presented and packaged in a way that: i. allows all target groups to understand and engage with the content provided; ii. that addresses the various social, religious and cultural attitudes that continue to act as a barrier to HIV prevention and control; iii. allows it to be disseminated in schools and other key spaces where communities meet or are physically confined; iv. includes evidence and measures that promote behavior change; v. specifically challenges stigma and discrimination and advocates for the acceptance of all PLHIV especially key and vulnerable populations;

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	(c) Be adapted to the age, gender, disability, nature of activities and sexual practices of target groups; *(d) Address social, religious and cultural attitudes, beliefs and practices and unequal gender relations and specifically sensitize men on HIV prevention, gender-based violence and gender inequality and challenge traditional dominant conceptions of masculinity;* *(e) Be carried out in schools and other institutions of learning, prisons and places of detention, in places of worship, workplaces, amongst the police and military forces and in rural and urban communities;* *(f) Be guided by evidence on potential opportunities for and barriers to behavior change;* *(g) Include effective measures to ensure that information, education and communication translate into behavior change;* *(h) Challenge stigma and discrimination and address misinformation about HIV and AIDS, persons living with HIV and members of vulnerable groups and most at risk populations;*	vi. allows for the inclusion of different categories of people with disabilities. The above is key for all successful educational and informational campaigns on HIV and AIDS in the country and moves away from vague and unfounded campaign requirements in the HAPCA, such as the need to '*focus on the family as the basic social unit'* and towards more people- centered messaging, which should be removed from the Section. Kenya has carried out various county/countrywide focused campaigns such as *Nimechill*, the *Mpango Wa Kando* HIV/AIDS campaign and more recently the *Kick out HIV Stigma* campaign among others, and have become an integral part of HIV prevention efforts. The optimization of HIV campaigns needs to be a priority as the number of HIV infections in the country continue to increase at a staggering rate, particularly among adolescents and young people.

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	(i) Promote the acceptance of persons living with HIV and members of vulnerable groups and most at risk populations; *(j) Present messages in formats that facilitate the inclusion of different categories of persons with disabilities.*	
Section 5- HIV and AIDS education in institutions of learning	Section 5 of the HAPCA is agreeable, but could benefit from an additional sub-section, namely, sub-section (b) which borrows from Section 2(a) of the EAC Act which requires: *(a) the content, scope and methodology of HIV and AIDS prevention and management courses at each educational level are based on age appropriate, scientifically accurate, evidence informed and rights based information* In addition, we request that Section 2(c) be taken out entirely to allow for those mandated to develop an approved course content, use their full discretion to decide whether or not the distribution of birth control devices would be appropriate in some instances or not.	Section 2(a) of the EAC Act is a vital addition to an important section on the integration of course content on HIV and AIDS and other sexually transmitted diseases into main stream learning within both public and private institutions. HIV prevention naturally fits into the bigger comprehensive sexuality education (CSE) debate. Comprehensive sex education includes age-appropriate, medically accurate information on a broad set of topics related to sexuality, including contraception, safe sex practices and prevention of HIV and AIDS and other STIs. CSE is often misunderstood as inappropriate and as a tool to promote sexual promiscuity among the youth. On the contrary, the interventions within comprehensive sex education provide adolescents and young people with the tools they need to make informed decisions about their sexual and reproductive health. As civil society push for the adoption of CSE in all learning institutions, Section 5, once revised, should

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		continue to allow for the integration or the provision of modules on relevant, age appropriate, scientifically accurate, evidence informed and rights based courses on HIV and AIDS.
Section 6- HIV and AIDS education as a healthcare service	Section 6(3) should be re-drafted to mirror section 8(3) of the EAC Act, which provides: *8(3) The training of healthcare providers under subsection (2) shall include education on HIV and AIDS related ethical and human rights issues including confidentiality, attitudes towards Persons living with or affected by HIV and informed consent and the duty to provide treatment.* All other sub-sections should remain as is.	Section 8(3) is basically in support of a rights-based training curriculum for healthcare providers. The inclusion of 'human rights' to the sub-section will oblige state actors to ensure healthcare workers, as service providers implement their mandate guided by the promotion and protection of our human rights guaranteed under the Constitution of Kenya, 2010. Despite receiving training on the ethical and rights based approaches to HIV service delivery, studies show that healthcare workers' attitudes towards People Living with HIV (PLHIV) are often discriminatory. These negative attitudes consequently discourage PLHIV from accessing life-saving medicines and other key services, such as sexual and reproductive health services.
Section 7- HIV and AIDS education in the workplace	Section 7 (1) (b) and subsection (2) should be amended and aligned to the language used in section 9 as follows: (b) employees of private and informal and civil society	This section will strengthen the legal obligations placed on employers in the various sectors of society.

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	(2) The information provided under subsection (1) shall cover such issues as non-discrimination, reasonable accommodation, confidentiality in the work-place and attitudes towards employees living with HIV.	
Section 8-HIV and AIDS information in communities	We submit, that section 11(1) of the EAC Act be included as sub-section 8(1) of the HAPCA. Section 11(1) provides: *"11(1) The Government, in partnership with relevant stakeholders, including civil society and religious, cultural and other community leaders, shall sensitize communities on the dangers of culture practices that are harmful to health and contribute to HIV transmission, including but not limited to child marriage, female genital mutilation and widow inheritance, and shall take steps, including working with cultural structures to eradicate or transform these practices"* The existing section should remain; however, it will become sub-section (2), following the structure in Section 11 of the EAC Act. We also propose that we include Community Health Volunteers and Advocates to the list of stakeholders.	Section 8 does not adequately address the sensitization of communities on HIV and AIDS. It leaves out key stakeholders and does not mention what the scope of these community sensitizations should entail. Section 11(1) if domesticated, will promote a multi-stakeholder approach to community sensitizations thereby allowing for a more targeted, collaborative and rights-based responses to information sharing where messaging for the protection of vulnerable and marginalized groups of PLHIV can be prioritized and harmful practices eradicated.

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PART III- SAFE PRACTICES AND PROCEDURES		
Sections 9- Testing of donated tissue & **Section 10**- Testing of donated blood	We propose that sections 9 and 10 be merged into one comprehensive section on the donation of bodily parts and blood and aligned to section 13 of the EAC Act.	Section 13 of the EAC Act should be adopted for the following reasons: i. It embraces informed consent and pre and post testing counselling procedures to HIV testing. Though it still highlights the importance of a negative HIV test result before donation can take place, it ensures HIV tests are carried out in an ethical and rights-based manner; and ii. It emphasizes the confidential nature of the HIV test results belonging to potential donors. And although the potential recipient can exercise additional caution and demand for an HIV test before the relevant surgery, the potential donor's HIV status shall be kept private and only information on whether they are a match or not will be disclosed to the potential recipient. This added element of confidentiality may act as an incentive to potential donors and increase the number of donations being carried out in the country. However, this benefit can only be realized if this and informed consent processes are implemented correctly.

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Section 11- Guidelines on surgical and similar procedures	This Section is in conformity with the Constitution and other enabling laws and can be maintained in the HAPCA as is.	The development of guidelines that protect surgical staff and those undertaking similar procedures is critical for the protection of healthcare workers who handle sensitive bodily material on a daily basis. Unfortunately, we have not come across guidelines developed by the Ministry that cover HIV transmission prevention during surgical procedures, but hope they are either in existence or being developed. The safety needs of healthcare workers must be addressed through the development of well enforced guidelines and protective measures and equipment, all of which are necessary for the seamless facilitation of HIV testing and treatment services.
Section 12- Penalty for unsafe practices or procedures	Section 12 is in conformity with the Constitution and other enabling laws and should be maintained in the HAPCA as is.	As a standalone provision, Section 12 ensures that professional misconduct or negligence which causes another to be infected with HIV is rightfully considered a serious offence. The additional penalty of the potential revocation of a business permit or license of an institution of an individual confirms this position and should act as a deterrent to misconduct.
Other Recommendations	Add Section 14 of the EAC HIV on the prevention of mother-to-child transmission as a stand-alone section under this Part.	Typically, women and girls are diagnosed with HIV when accessing other healthcare services such as ante-natal care or post-rape care. As the child-bearing gender, there is a risk that a HIV positive mother could

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		transmit the virus to her baby anytime during pregnancy, childbirth or breastfeeding. Information and treatment to prevent perinatal transmission or mother-to-child transmission is therefore vital. Women often learn that they are HIV positive before their male partners do, by virtue of their overall sexual and reproductive health needs. Therefore, the existence of HIV-related services designed specifically to reach women, such as services to prevent mother-to-child HIV transmission are critical to the fight against increased HIV infections in the country. The integration of programmes on the prevention of mother-to-child transmission of HIV into sexual and reproductive health services is recognized in the prevailing national guidelines on HIV, including the guidelines for prevention of mother to child transmission (PMTC) of HIV and AIDS where it is stated that: *"For any of the PMTCT interventions to be successfully implemented counseling and testing (CT) must first be done. Routine HIV testing with opt-out option is recommended. This is followed by appropriate medical, surgical interventions including antiretroviral prophylaxis, safer obstetric practices as well as infant feeding counseling and provision of appropriate infant feeding."* Section 14 of the EAC Act, will simply legitimize ongoing efforts to prevent mother to child transmission

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		in the country and offer a framework which the ministry can continuously refer to when developing additional guidelines, reflecting on or advancing current interventions.
PART IV- TESTING, SCREENING AND ACCESS TO HEALTHCARE SERVICES		
Section 13- Prohibition against compulsory testing & **Section 14-** Consent to HIV testing	Section 13 is in conformity with the Constitution and other enabling laws and should be maintained in the HAPCA as is. Section 14 could benefit from the following amendments: a) 'Consent to HIV testing' to be replaced by 'informed consent to HIV testing' b) Section 14(b) should be revised to expound upon the rights of children to consent to HIV testing as set out under Section 22 of the EAC Act. c) Sub-section 14(2) should be included to the newly drafted section which brings together section 9 and 10 of the HAPCA to ensure the consent procedures pertaining to donation services are not erroneously overlooked.	Compulsory HIV testing should be prohibited as a general rule except in exceptional circumstances similar to that provided in Section 13(3) where a person is charged for an offence under the Sexual Offences Act, 2006 or under any other written law. The opposite of compulsory testing is voluntary or consensual testing which is why we are reviewed the two sections simultaneously. Consent can only be properly elicited if the person consenting to the HIV test has received the full information necessary to make an autonomous decision on whether to test for HIV or not. We therefore propose that the word 'Consent' within the HIV and AIDS Prevention and Control Act (HAPCA) be referred to as 'Informed Consent' to stress the importance of complete information during the consent process. The Kenya HIV testing guidelines in clause 4.1 state that "children and youth up to the age of 14 years should be tested with the consent of a parent or

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		guardian. However, those from 7 years and above need to give assent after their parents give consent. Other clients from 15+ years and emancipated minors irrespective of age can give their own consent…" The above provision, is a simplified interpretation of Section 22 of the EAC Act. Section 22 in summary, stipulates: a) Informed consent to an HIV test to be performed by a child, shall be obtained from the parents or guardian of the child. b) If informed consent is unreasonably withheld from the parent or guardian this lack of consent shall not constitute an obstacle to testing and counselling. c) A child may be tested without the consent or notification of a parent or guardian if: i. there are reasonable grounds for the test to be undertaken ii. the child understands the implications of the test and is capable of making informed choices on matters relating to the results of the test; iii. the child has been appropriately counselled; iv. the child has voluntarily consented to undergo the test; v. it is in their best interests to undergo the test.

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		Clause 4.1 of the Kenya HIV testing guidelines and Section 22 of the EAC Act should be merged into one comprehensive sub-section or section to ensure children are not unreasonably prevented from undertaking a HIV test or having their test results kept confidential, on account of their age. Although emancipated children can give their consent without parental intervention, children over 7 should be legally permitted to give their assent or their consent if the situation allows. The sexual debut of children in the country starts at a very young age and teenage pregnancies are at an all-time high, and sexual and gender based violence against adolescent girls and young women is increasing. The Ministry have revealed that that between January and February 2022, they handled 45,724 cases of pregnant adolescents aged between 10 and 19 years. They further stated that every week 98 girls between the ages of 10-19 are infected with HIV due to sexual and gender based violence. Access to HIV testing is therefore necessary and our laws should in no way act as a barrier to children accessing HIV services, as they are already engaging in sexual activity, either consensually or because they have been subjected to involuntary sexual violence and rape.

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Section 15-Provision of testing facilities	We propose that section 15 be re-drafted and aligned to section 20 of the EAC Act which states: *The Minister shall ensure that facilities for HIV testing are made available:* *(a) free of charge, to persons who voluntarily request an HIV test in respect of themselves; or* *(b) are required under the provisions of this Act or any other written law to undergo an HIV test.*	To eliminate any doubt that HIV testing is free within public health facilities and to ensure the citizenry is not subjected to unlawful payment for HIV tests within public facilities in the country, we would suggest that Section 15(a) of HAPCA be drafted to include the statement 'free of charge'.
Section 16- Testing centres	Section 16 is okay and should be maintained as is in the HAPCA.	N/A
Section 17- Pre-test and Post-testing counselling	Section 17 of the Act requires that all testing centres provide pre and post-test counselling to any one undergoing a test or any other person likely to be affected by the results of such test. However, it does not indicate what kind of information should be provided or discussed during these counselling sessions.	The pre-test content provided in the EAC HIV Act, enables one to understand: i. The nature of HIV and AIDS; ii. The nature and purpose of an HIV test; iii. The benefits and potential risks of testing;

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	We propose, Section 17 of HAPCA be aligned to Sections 17 and 18 of the East African Community HIV and AIDS Prevention and Management Act, 2012 (EAC HIV Act), which lists the content of both the pre and post-test counselling sessions.	iv. Available services in the case of either a negative or positive result; v. The confidentiality of the results; vi. The right to decline to take a test and protection against adverse effects of refusing to take a test; and vii. The importance of disclosure to those that may be at risk of exposure to HIV. The post-test content provided in the EAC Act, provides for counselling in the event the HIV results are negative or positive. If found negative, then information on the importance of testing and the necessity of preventive measures is shared. However, if found positive, a more comprehensive counselling session will need to be held covering topics such as: i. The consequences of living with HIV; ii. The modes of prevention and transmission of HIV and other opportunistic infections; iii. The importance of disclosure of the person's status to sexual partners; iv. Available treatment and the need to seek HIV services on a continuous basis. Moreover, Section 18 (4) of the EAC Act, looks at HIV counselling services in a continuum, where counselling is not a one off event but is viewed as an integral element of HIV services throughout a patient's lifetime.

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		Whilst we note there is a chapter in the National Guidelines for HIV Testing and Counselling in Kenya, 2010 which details the elements that make up the minimum HTC package (pre-test session, HIV test and post-test session), we argue that the HAPCA should be the first point of reference. Awareness of these National guidelines which address what people living with HIV should expect when accessing HIV services is low amongst communities of PLHIV, making it difficult for them to hold healthcare workers accountable for the provision of holistic HIV counselling services. The HAPCA, should comprehensively state what the pre and post-test counselling services should encompass, as stated in the EAC Act. We assert that should these counselling services be properly administered, PLHIV and others at risk of exposure, will be adequately equipped to adhere to treatment or prevent transmission of HIV.
Section 18- Results of HIV test	We propose that this section precede an amended version of section 22 on disclosure, therefore falling under Part V on Confidentiality. Otherwise, the section adequately addresses the confidentiality of HIV test results and those authorized to have access, i.e. the person tested and in the case of a child or a person with	This section speaks to the health data rights of PLHIV and should be read together with the sections on confidentiality and disclosure under Part V of the HAPCA. The proposals for the following sections, expound upon the need to prohibit the notification of one's HIV status to third parties without adherence to informed consent

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	disability incapable of comprehending the result, the parent, guardian, partner or adult offspring.	procedures. Though this section brings to the fore the main persons that should have access to the HIV results of a person, we are seeing breaches in the handling of this data within health facilities, resulting in increased levels of stigma and discrimination of PLHIV both within health facilities and amongst their respective communities. Another reason why this section would be better placed under Part V is because of Section 23 which makes it an offence to breach the confidentiality of PLHIV. Any breach with respect to the handling of the HIV results of a person will be subject to Section 23. This brings on board an element of accountability on the part of health facilities and the individual healthcare providers.
Section 19- Access to healthcare services	Section 19(1) is an important section that highlights the need for access to healthcare services to persons with HIV without discrimination. However, subsection (2) fails to comprehensively address what the government is obliged to do to ensure this access to healthcare services for PLHIV is achieved. We submit that section 19 be aligned to section 32 of the EAC HIV Act which provides the following: *32(1) Persons living with HIV have the right of access to quality healthcare services*	Section 19 as is, insufficiently addresses how the government will promote access to healthcare services. It states that the government shall 'take the steps necessary' to ensure this access, but not what these steps are. Section 32(1) of the EAC HIV Act, does provide a framework to facilitate the provision of healthcare services that governments can use to inform their policy priorities, interventions and their practices. For instance, the inclusion of PLHIV in the design, development and implementation of national policies

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	(2) The Government shall take appropriate measures to provide sustainable treatment, care and support to persons living with HIV, including access to affordable, anti-retroviral therapy and other essential medicines and prophylaxis to treat HIV or prevent opportunistic infections. The appropriate measures subsection (2) alludes to are then listed under subsection 32(3) to include: the use of all TRIPS flexibilities; entering into arrangements for pooled procurement of HIV and AIDS related equipment; ensuring access to accurate information on HIV; ensuring the population is protected from fake or counterfeit medicines and treatments; and ensuring the active involvement of PLHIV and key and vulnerable populations in the design, development and the implementation of a national plan on access to HIV services.	that focus on the improving access to HIV services for different target groups is a key priority area. And if enforced will enable the government to address the underlying issues affecting PLHIV and the barriers to access to quality HIV related healthcare services. Addressing ARV stock outs and the need to protect PLHIV from fake or counterfeit medications are also measures that must be adopted by the government. The list provided under Section 32(2) may not be exhaustive and other measures deemed necessary could be directly stated in the section, such as measures to address the stigma and discrimination perpetrated by healthcare workers and within the community, as well as ARV shortages which has been an issue of concern over the past 2 years. Communities of PLHIV have on several occasions mentioned the infrastructural issues regarding where they access their ART services. These services are often provided in areas where all persons seeking health services can see/access creating an environment for discrimination to thrive. This acts as a barrier to treatment adherence and should be explicitly provided for as one of the measures the Government needs to consider.

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Section 20- Privacy guidelines & **Section 21**- Confidentiality of records	Section 20 of HAPCA provides for the development of Privacy guidelines which will include the use of identifying codes relating to the recording, collecting, storing and security of information used in respect of HIV tests or related assessments. Section 21 then expounds upon the confidentiality of these records by prohibiting the use of information that directly or indirectly identifies the person to whom an HIV test relates, except in accordance with the aforementioned privacy guidelines. Moreover, according to Section 41 of HAPCA, the Ministry may at their discretion develop guidelines that enable the implementation of anonymous testing. We suggest that if the development of the guidelines mentioned above do not materialize or are no longer a priority at this time, it would be prudent to include section 25 of the EAC HIV Act to the HIV Act.	Although, these sections of the HIV Act speak to the privacy needs of PLHIV, there are no such guidelines in existence to date. We are aware that the Data Protection Act of 2019 (DPA) and its accompanying regulations are meant to address the data protection concerns of PLHIV among other vulnerable groups by protecting sensitive personal data, which refers to data revealing a person's health status. However, as the enforcement of the provisions of the DPA is still in its nascent stages, and the potential of the Act to effectively protect the privacy and confidentiality needs of PLHIV is still uncertain, there must be provisions within the HAPCA that exhaustively protect the health data rights of PLHIV. Section 25 of the EAC provides a blanket statement on the right to privacy and confidentiality regarding a person's HIV status. It requires all those in possession of information in relation to the HIV status of a person to observe confidentiality while handling that data. Finally, section 25(3) prohibits the disclosure of any information concerning a person's HIV status except in a handful of scenarios where this disclosure is necessary for the prevention of transmission to those significantly at risk of exposure; clinical decisions for best interests of the patient need to be made; research needs to be conducted (though this must be non-identifying information); and upon an order of a court.

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		It is expressly stated that the contravention of this section is an offence under the EAC HIV Act. However, there is no provision within the HAPCA to this effect, despite this breach directly violating Article 31 of the Constitution of Kenya, 2010. Given the increased digitization of health systems in the country, we are of the opinion that in addition to the inclusion of Section 25 into the HAPCA, Section 20 of HAPCA should remain in the Act. As the DPA is implemented and assessments are conducted on its ability to adequately protect the data rights of PLHIV, there will be a provision that allows for the development of privacy guidelines, should the need for more comprehensive guidance be required. Currently, we are hearing of cases where some of the forms used for HIV testing are indicating the key population group the person seeking the test belongs to. This means that marginalized populations are easily identified and since that information is not always well protected, this information can be used to the detriment of these individuals who now face a higher risk of stigma and discrimination. The HV tribunal and the high court has reaffirmed the need to respect the right to privacy of PLHIV and as guided by the courts it is imperative that we ensure through the strengthening legal provisions that this

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		right and the prohibition of a breach of this right is adequately provided for in the HAPCA.
Section 22- Disclosure of information & **Section 23-** Penalty for breach of confidentiality	The disclosure of information relating to a person's HIV status is subject to the process laid down in Section 22 of HAPCA. Written consent from the person whose HIV related data is being handled is the first and most vital element of disclosure. The following provisions are relevant only if the person to whom consent should be obtained is unable to give their consent for any reason whatsoever. Although this section covers all possible scenarios where disclosure would be authorized, it does not include provisions on third party notification also known as assisted partner notification services (APNS). Assisted Partner Notification Services (APS), the term used interchangeably with index testing, is a cost-effective public health strategy used to curb the spread of HIV by reaching the undiagnosed populous in Kenya through notifying the sexual or drug injecting partners of people living with HIV of their possible exposure to HIV, offering testing and linking them to care. Protecting the rights of PLHIV from such disclosure are key in ensuring the country meet its new global HIV targets.	The current National policy framework on HIV index testing consists of the National Guidelines for HIV Testing and Counselling in Kenya (National Guidelines) which were developed in 2010 to keep abreast with international recommendations and the 2015 Kenya HIV Testing Services Guidelines which aim to provide more comprehensive guidance to healthcare workers, policy makers and non-governmental institutions on the delivery of HIV testing services. The National guidelines explicitly address the need to maintain confidentiality when conducing all types of HIV testing and that the infrastructure in place protect patient privacy. The Kenya HIV Testing Services Guidelines similarly discuss confidentiality and refer to breach of confidentiality as an offence under the HIV Act. Against the backdrop of reports that Kenya has met their 2020 target of 90% of all Kenyans living with HIV knowing their status, are reports of coercive approaches to index testing being performed in health facilities, especially against women who interact with the healthcare system more frequently than their male counterparts. This is the case as HIV programmes now target pregnant women and are usually forcibly implemented through pre-natal or post-natal testing.

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	We propose that the provisions in Section 25 of the EAC HIV Act be included as an extension of Section 22 on disclosure. However, we would like to suggest the following revisions to Section 25(4) as follows: 4) A person providing treatment, care or counselling services to a person living with HV may notify a third party of the HIV status of that person if- a) In the opinion of the person providing treatment, care or counselling services, after discussion of the matter with the person living with HIV, that person is not **at risk of serious harm** from the third party or from other persons as a consequence of such notification; *[Serious harm needs to be defined more clearly under section 2 of the Act as it is unclear what constitutes 'serious harm'. The discretion of HIV services providers to decide what this means should be limited by the Act. We suggest that the definition include stigma and discrimination and all harm emanating from it]*	To ensure that PLHIV in all their diversity are not subjected to coercive testing or the non-consensual notification of their status to third parties, there needs to be a clear provision in HAPCA on what HIV service providers can and cannot do when seeking to implement APNS in order to reach the countries HIV testing and treatment targets. In section 23 (2) and (3) of the EAC HIV Act, it is evident that the person providing treatment must first encourage the PLHIV to inform their sexual partner or anyone else at risk of contracting the virus and may only notify a third party if they are requested to do so by the person living with HIV. We note however, that the EAC HIV Act does permit the person providing treatment to disclose one's status in specific situations without being expressly requested to by the PLHIV. We argue, that this should only be the case in a limited number of situations. While we appreciate the fact that the EAC brought out the issue of notification, the changes we are proposing would give the PLHIV a reasonable opportunity to notify their sexual partner or other at risk persons. Should they fail to do so, then the healthcare provider may intervene. We have heard accounts from communities of PLHIV that their sexual partners are notified of their status by

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	b) The third party to be notified is at **significant risk** of HIV transmission from the person living with HIV. *[We propose that this section not be included. This is because 'significant risk' is subjective and divides risk into two groups where those at low risk should not be prioritized the same way those at significant risk are. It is therefore divisive and places risk on a scale, which should be avoided.]* c) the person living with HIV, after appropriate counselling **and after being given a reasonable opportunity to disclose**, does not personally inform the third party at risk of HIV transmission **after a period of [time allocated];** ***[The time within which people tested positive should notify at risk partners or persons should be clearly provided for. And only after reasonable efforts have been made by the healthcare providers to convince the PLHV to do so. Should this fail, then they can proceed with disclosure. This is also provided for under the Kenya HIV Testing Services Guidelines, 2015]***	healthcare workers: i) without their informed consent and ii) before they have even left the healthcare facility or had time to absorb the information shared. Consequently, APNS will need to be comprehensively provided for in the Act, and enforcement of these provisions and existing policies will need to be strengthened. Various court judgements have reaffirmed the right to privacy and confidentiality and emphasize the importance of respecting this vital right. In a recent judgement delivered by the HIV Tribunal, it was stated as follows: *"16. We agree with the exposition of the law above and add that Section 22 of HAPCA must be understood in this context – it protects against the unnecessary revelation of information relating to the HIV status of a person. Such information forms part of a person's private affairs, which disclosure can potentially cause mental distress and injury to a person and there is thus need to keep such information confidential. Taken in that context, the right to privacy in relation to a person's HIV status protects the very core of the personal sphere of an individual and basically envisages the right to live one's own life with minimum interference and without the risk of stigmatization, discrimination and rejection by family, friends and the community."*

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	d) the person providing treatment, care or counselling services has informed the person living with HIV of the intention to notify the third party; ***[This is okay]*** e) the person living with HIV is dead, unconscious or otherwise unable to give consent to the notification and is unlikely to regain consciousness or the ability to give consent; and ***[This is okay]*** f) in the opinion of the person providing treatment, care or counselling services, there was a significant risk of transmission of HIV by the person living with HIV to the third party. ***[Similar to my comments made under (b). This sub-section should not be added to the HAPCA]***	
Section 24- Prevention of transmission	We propose that Section 24 which was declared unconstitutional by the High Court Judgement of 2015, (Aids Law Project v Attorney General & 3 others [2015]) be removed from HAPCA	HIV criminalisation is evidenced in Kenya through a general disease transmission offence in its Penal Code and in Section 24 of HAPCA which criminalizes the failure by a person living with HIV to take "all

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	indefinitely in compliance with court orders and directions.	reasonable measures and precautions" to prevent HIV transmission and the failure to inform "sexual contacts" of their HIV-status. In 2015, the Kenyan High Court declared this provision to be unconstitutional and invalid on the basis that it is vague and overbroad and to violate the protection of privacy unjustifiably. HIV Justice Worldwide describes "HIV criminalization" as the unjust application of criminal and similar laws to PLHIV based on their HIV-positive status, either via HIV-specific criminal statutes or general criminal or similar laws. As of 2019, 75 countries globally had HIV-related criminal laws; 29 of these were found in Africa. In the same year, there were HIV-related arrests, investigations, and criminal sanctions imposed in 72 countries globally. 40.3% of these countries used HIV-specific criminal laws, 51.4% used general criminal laws, while 8.3% relied on a mixture of both types of the law. There is no evidence that laws such as this one or Section 26 of the Sexual Offences Act of 2006 curb HIV transmission; on the contrary—the international consensus is that these laws drive HIV epidemics by driving people away from testing and treatment, perpetuating stigma and discrimination, and preying on those most vulnerable to HIV infection.

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		The EAC HIV and AIDS Prevention and Management Act of 2012 does not criminalize HIV exposure, non-disclosure, or transmission. Instead, it embodies a human rights-based approach to HIV treatment and prevention. We therefore want to see the High court judgement enforced and Section 24 withdrawn from HAPCA.
Section 25 to 30- The HIV and AIDS Tribunal	Section 27, 28, 29 and 30 are all well drafted and can be maintained in the HAPCA. Our main contention is with Section 26 which deals with the jurisdiction of the HIV Tribunal, established under Section 25 of the Act. Section 26 provides as follows: "*26. (1) The Tribunal shall have jurisdiction —* *(a) to hear and determine complaints arising out of any breach of the* *provisions of this Act;* *(b) to hear and determine any matter or appeal as may be made to it* *pursuant to the provisions of this Act; and* *(c) to perform such other functions as may be conferred upon it by this* *Act or by any other written law being in force.* *(2) The jurisdiction conferred upon the Tribunal under subsection (1) excludes* *criminal jurisdiction."*	In 2015, the High Court gave orders in favor of a petitioner challenging a decision by the HIV and AIDS Tribunal where it ruled that it had the jurisdiction to entertain applications for redress for violation of fundamental rights and freedoms under the Bill of Rights. According to the petitioner, although Article 23 (2) confers jurisdiction to hear and determine matters in the Bill of Rights on subordinate courts created by Parliament and conferred with original jurisdiction, the Tribunal is not such a subordinate court. Further, the petitioner noted that no law has been enacted to give subordinate courts and especially the Tribunal the jurisdiction. In the courts view, although the jurisdiction vested in the High Court is not exclusive, it cannot be exercised by any subordinate court or tribunal in the absence of enabling legislation. The Tribunal was introduced to expedite access to justice for PLHIV whose rights under the HAPCA have

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	We propose that the jurisdiction of the HIV and AIDS tribunal be expanded to allow them to hear and determine questions of alleged violation of constitutional rights. Further, we propose that the amended HAPCA include within the Tribunal membership: i. One person living with HIV, having such specialized skill or knowledge necessary for the discharge of the functions of the Tribunal, nominated by networks or organizations working with communities of persons living with HIV ii. One person having such specialized skill or knowledge necessary for the discharge of the functions of the Tribunal, nominated by networks or organizations working with priority populations iii. Among legal membership, at least one should have specialized expertise in HIV and human rights iv. One person being a Medical practitioner having specialized expertise on HIV	been violated. In view of the above, we submit that Section 26 be amended to confer on the Tribunal the jurisdiction to determine violations of rights stipulated in the HAPCA as well as those provided in the Bill of Rights under our Constitution.

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PART VIII- Discriminatory Acts and Policies **(Section 31- 38)**	Sections 31 to 38 should be aligned to sections 26 to 31 of the EAC Act which provide more comprehensive protection from discrimination within the various spaces. We also propose that section 31(2) be removed from the Act entirely as it leaves room for discriminatory employment practices. Finally, while we note the provision in the EAC HIV Act on discriminatory practices is largely provided for under sections 31 to 38 of HAPCA, a general prohibition of discrimination is missing. We therefore propose, that section 24 of the EAC HIV Act, be domesticated and included to PART VIII of HAPCA.	Section 24 of the EAC Act provides: (1) Persons living with or affected by HIV are entitled to enjoy all human rights, without any form of discrimination. (2) No person may directly or indirectly discriminate against a person living with or affected by HIV on the basis of that persons actual or perceived HIV status. (3) A person who suffers an act of discrimination based on the person's actual or perceived HIV status or that of another person may institute legal proceedings against the person who committed the discriminatory act to claim damages. The prohibition of discrimination is then categorized according to specific acts and policies where discrimination may likely occur. Although this is welcome, there is need for a blanket provision on discrimination which is drawn from Article 27 in the Constitution of Kenya. Section 24 above, succinctly addresses discrimination and offers legal redress for those who suffer discrimination on account of their actual or perceived HIV status. HAPCA would benefit from this as it would cover discrimination against PLHIV as a whole with the existing provisions providing emphasis to the situations where PLHIV are most at risk of discrimination.

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		Section 26 of HAPCA only prohibits discrimination but includes provisions that require employers to take all measures to accommodate the needs of PLHIV.
PART IX- Research **(Section 39 to 42)**	The sections under this part only refer to HIV or AIDS related human biomedical research and fails to consider other forms of research including clinical or social research on PLHIV. This is a grave omission as research cannot be reduced to human biomedical research but must account for the research based on the social, cultural or other non-invasive aspects of life as a person living with HIV. We propose that the sections on research under the EAC HIV Act (sections 40 and 41) be domesticated and included in the HAPCA. If this Part has not yet been operationalized, we recommend that this undertaken.	Human, social or other scientific research on various issues affecting PLHIV has been ongoing and reliance placed on other Acts in place, more specifically the Science, Technology and Innovation Act, 2013. HAPCA needs to be amended to keep abreast with the scope of research being carried out in Kenya on PLHIV. The Data Protection Act, which gives effect to section 31 is now our go to piece of legislation when it comes to the handling of personal health information. The privacy rights of data subjects have now been brought to life by this Act. As such, adherence to this Act should be specifically provided for under this Part of HAPCA.
Other recommendations	Domestic Part VI of the EAC HIV Act on the protection of vulnerable groups and most at risk populations.	Part VI which is made up of seven (7) sections which center around the protection of key vulnerable and most at risk populations. These sections comprehensively address the rights of children, women and girls, youth and adolescents, persons with disabilities, prisoners and older persons.

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		The EAC Act provides protection to a range of populations at higher risk of HIV exposure and particularly vulnerable to the impact of HIV, rather than simply protecting people living with HIV. This significant advancement reflects the EAC Bill's deeper understanding of the role of human rights in relation to HIV. Protecting human rights not only reduces HIV-related stigma and discrimination. It also reduces the risk of HIV exposure and also reduces the impact of HIV on people's lives for affected populations. For this reason, the EAC Act protects the rights to equality, non-discrimination, access to appropriate HIV-related information and health care services, participation as well as protection from violence for a range of populations including children, women, people with disabilities, prisoners, older people and other populations at higher risk of HIV exposure for various reasons such as poverty, livelihood, sexual practices, disrupted social structures or population movements. The domestication of this Part in the Act will be a major win for the implementation of rights-based responses which focus on bringing those most at risk of contracting the HIV virus or who face significant barriers to accessing HIV related health services to the forefront of all HIV programmes.

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